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280-161—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 649

M. RAYMOND ADLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1967. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certiorari was extended to and including September 25, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a false complaint of bribe solicitations, made to the F.B.I. for the purpose of having an investigation initiated, is a false statement in a matter

within the jurisdiction of a federal agency under 18 U.S.C. 1001.

2. Whether the evidence supports the verdict.

3. Whether evidence was properly admitted of petitioner's unsolicited, volunteered admission to F.B.I. agents while they were examining corporate books in his office after advising him of his rights.

STATUTE INVOLVED

18 U.S.C. 1001 provides, in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner, after waiving trial by jury, was convicted in the United States District Court for the Southern District of New York under an indictment charging that on July 26, 1963, he made a false statement to the F.B.I. to the effect that certain public officials had exacted bribes from him, in violation of 18 U.S.C. 1001 (II R. 1a). On December 5, 1966, he was sentenced to pay a fine of $2,500 (I R. 187). The court of appeals affirmed.

Petitioner was the president of a corporation which in early 1963 was engaged in construction work at a naval facility in Connecticut under a three-million dollar contract with the United States Navy (I R. 19–20, 36).

On July 26, 1963, petitioner, on his own initiative, entered the New York City office of the F.B.I. He told the agent assigned to speak with him that he was there on behalf of a friend who had a construction contract with the government. He said that, in performing the contract, the friend was being required to pay bribes to various government officials (I R. 4–5). Petitioner stated that he "hoped the F.B.I. would do nothing more than reprimand the Government officials involved so that this bribery would stop" (I R. 5). The agent asked petitioner whether he was really talking for a friend or whether he was speaking about his own situation. Petitioner replied that he was speaking of himself (I R. 5, 10). The agent thereupon advised petitioner "that he need make no further statements, that anything he did say could be used against him, and that he was entitled to the services of counsel before continuing" (I R. 5). The agent pointed out that, after an allegation of bribery, the F.B.I. could not merely reprimand those accused, but would investigate the allegation and submit the matter to the proper authorities (I R. 6). Petitioner stated that he did not wish to make any other statements at that time. He said that, if questioned by anyone else regarding the alleged bribery, he would deny the entire matter. He told the agent, however, that he would be in his New York City office the following Monday morning (I R. 6).

On Monday, July 29, 1963, the agent visited petitioner at his office and again advised him of his rights. Petitioner said that he did not wish to discuss the

matter further since he had not yet spoken with his attorney. He felt that, at the early stage of the construction contract, it would be unfair to himself and his company to say anything further about possible bribery (I R. 6–7). He added that the charges could not be proved without his complete cooperation, and that, if questioned by other agents or by a grand jury, he would deny knowledge of any bribery (I R. 7). The agent then left petitioner's office (I R. 7, 12).

As a result of petitioner's charges, the F.B.I. conducted an investigation to determine whether any government employees involved with petitioner's contract had in fact solicited or received bribes (I R. 14, 54–57, 61–62, 67–68, 125–127, 140–141). In November 1963 petitioner received a subpoena to appear before a federal grand jury investigating the matter (I R. 96). Counsel whom he retained informed the office of the United States Attorney that petitioner was being advised to claim his privilege against self-incrimination when he appeared before the grand jury, and that counsel did not wish him to be questioned further by any authorities on the matter (I R. 97–99). On December 5, 1963, petitioner appeared before the grand jury and declined to answer questions, invoking the Fifth Amendment (I R. 99).

Over a year later, in February 1965, an F.B.I. agent engaged in the continuing investigation of the bribery charges telephoned petitioner's office in Stamford, Connecticut, for the purpose of arranging to examine the corporation's books dealing with the Connecticut construction project. The agent was told by

petitioner's secretary that petitioner was recovering from an operation and would be unavailable, but that the books could be examined on February 25, 1965 (I R. 89–92). On that date, the agent who had telephoned, together with another agent, went to petitioner's office to look at the pertinent books (I R. 92–93, 110, 112–113). Upon their arrival they found petitioner at the office. They identified themselves to petitioner, explained that they were investigating the charges that he had been forced to make payoffs, and said that they would like to examine the records pertaining to the contract to see if they contained any verifying information (I R. 92–93, 125–127). Petitioner went into the next room and returned with a few volumes. As the agents sat at a desk to examine them, petitioner began to talk about his contract with the Navy and the problems he was having (I R. 93). The agents interrupted him, and advised him that "he didn't have to talk to [them], he didn't have to make any statement, and that any statement he did make could be used against him in a court of law, and that he could consult with an attorney, his attorney or an attorney of his choice" (I R. 93, 113–114, 119). Petitioner, however, continued to explain his contract problems, stating that the bribery accusations he had made in 1963 were false, that he had made the charges to "get even" with the inspectors and other government personnel involved with the contract who had been "giving him a rough time," and that he had thought that, if the F.B.I. would investigate the charges, it would keep these government officials "off

his back" (I R. 138, 140). After petitioner had talked for three to five minutes, the agents asked if he would make a written statement to this effect. Petitioner replied that he would not do so (I R. 112–114, 117–119).

ARGUMENT

1. Petitioner contends that a false complaint of bribe solicitations, made to the F.B.I. for the purpose of having an investigation initiated, is not a false statement "in any matter within the jurisdiction of any department or agency of the United States" under 18 U.S.C. 1001. He argues that the term "jurisdiction" contemplates a "rule-making or adjudicative power," and that, since the principal power of the F.B.I. is investigative in nature, rather than adjudicative, that agency is not within the coverage of the statute.

The purpose of the statute, however, is "'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93. It would be at odds with the purpose of the statute to interpret the term "jurisdiction" as referring only to "rule-making or adjudicative power" rather than to authority or power in general.[1] See *United States* v. *White*, 69 F. Supp. 562, 564 (S.D. Cal.); *United States* v. *Sanders*, 42 F. Supp. 436, 439 (S.D. Tex.). The phrase in which the term

[1] Indeed, in *United States* v. *Bramblett*, 348 U.S. 503, where the term "department or agency of the United States" as used in 18 U.S.C. 1001 was held to include the Disbursing Office of the House of Representatives, the court stated that it found "no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted" (348 U.S. at 507; see Pet. App. 8a).

appears was not meant to distinguish between different types of agencies or different official functions of a particular agency, but was meant only to differentiate between matters outside of or peripheral to the business of the department or agency involved and matters constituting the official, authorized functions of that body. As noted by this Court in *Gilliland*, it is the perversion and disruption of these "authorized functions" with which the statute is concerned (312 U.S. at 93).

Here, the false charges made by petitioner predictably set into motion the official, authorized investigative function of the F.B.I.,[2] causing the time and energies of several agents[3] to be diverted from other investigations and applied in aid of petitioner's purpose of intimidating and "getting even" with government employees whom petitioner felt had been "giving him a rough time" in evaluating his company's compliance with the specifications of the construction contract. In short, petitioner, for his own purposes, willfully set in motion and perverted the agency's authorized function of investigating alleged criminality of federal officials.

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[2] Petitioner does not question the fact that the F.B.I. is charged with the duty of investigating violations of federal laws in general (see 5 U.S.C. 299, 300; 28 C.F.R. 0.85), and is specifically authorized to investigate allegations of criminality relating to government officers or employees, including allegations of bribe solicitations by government officials which are in violation of 18 U.S.C. 201 (see 68 Stat. 998, now codified in 28 U.S.C. 535).

[3] Petitioner's charges also resulted in the expenditure of time by the federal grand jury which investigated into the matter brought to the F.B.I.'s attention by petitioner (see Pet. App. 4a).

Petitioner points out that in several cases the furnishing of false information to federal investigative agencies has been found not to fall within the prohibition of 18 U.S.C. 1001 (Pet. 10). All of these cases but one, however, involve situations where the defendant simply disclaimed culpability or attempted to divert suspicion by giving false answers to questions by officers involved in an ongoing investigation. In these cases—"the so-called 'exculpatory no' cases" (Pet. App. 8a)—it was found that such a false or negative response to an inquiry could not be considered a statement tending to pervert the authorized function of the agency involved. There is a material difference, however, between giving false answers during an interrogation and willfully initiating a criminal investigation by volunteering false information to trigger the functioning of the agency.[4] *United States* v. *Van Valkenburg*, 157 F. Supp. 599, 601–602 (D. Alaska); see *United States* v. *Stark*, 131 F. Supp. 190, 203–206 (D. Md).

The sole case cited by petitioner which did not involve responses to questioning is *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8). In that case the defendant initiated an F.B.I. investigation of a local police officer who, the defendant claimed, had beaten and severely injured him in violation of his civil rights after taking him into custody. While the divided court of appeals in the *Friedman* case held that this was

[4] As the court below pointed out (Pet. App. 9a), "the 'exculpatory no' cases are readily distinguishable from this case where appellant made an affirmative, voluntary statement deliberately intended to provoke agency action."

not a matter within the jurisdiction of a federal agency, as the terminology is used in the statute, it emphasized that the record in the case showed that the police officer admitted he had "scuffled" with the defendant twice after taking him into custody and that the defendant admittedly did have "some small, observable injuries" (374 F. 2d at 365). It is apparent, therefore, that the court considered the case as one where the defendant had made an exaggerated complaint rather than a totally baseless one. Where, as here, however, a person willfully manufactures and volunteers a totally baseless charge for the purpose of initiating an official federal investigation, he has perverted the functioning of the agency and is properly held liable under 18 U.S.C. 1001. So viewed, the Eighth Circuit's holding in *Friedman,* despite some of the language in the court's opinion in that case, is not necessarily in conflict with the holding of the Second Circuit in the instant case (see Pet. App. 6a–7a).

2. There is no substance to petitioner's argument that the evidence was insufficient to show that he made a false statement or that he harbored any criminal intent (Pet. 11–13). In addition to the evidence set forth in the Statement (*supra,* pp. 3–6), fifteen government employees connected with the administration of the construction contract testified that they had never solicited or been offered a bribe from petitioner and that they had never heard petitioner complain that any other officials were soliciting bribes from him (I R. 18–52, 73–86). The record plainly demonstrates that petitioner's discussion with the F.B.I.

of his charges after an appropriate warning (see Pet. App. 6a). In these circumstances, petitioner's statements were properly admitted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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